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No. A-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA HOLIDAY INN

vs.

LIQUOR CONTROL COMMISSION, STATE OF OHIO

On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

PARTIES AND AFFILIATIONS

All of the parties appearing in the Supreme Court of the State of Ohio are listed in the caption. Appellant's parent corporation is Holiday Inns of America, Inc. Appellant has no subsidiaries. Affiliates of Appellant operate Holiday Inns in other Ohio cities and in other states.[1]

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[1] Millcreek Investment Company, Ken Hills Investment Company, Riverfront Investment Company, Warren Hills Investment Company, Midtown Investment Company, Griffin Gate Catering Company, Eastland Catering Company, Rich Hills Operating Company, Cumberland Investment Company, Cambridge Investment Company, Park Hills Investment Company, Ohio Hills Investment Company, Indian Valley Realty Company, Great Northern Realty Company, Northern Hills Realty Company, Great Western Realty Company, Cove Lake Investment Company and Tex Ken, Inc.

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On Appeal From The Supreme Court of Ohio

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App. A, *infra* 1a-9a) is reported at 69 Ohio St. 2d 361, — N.E.2d — (1982). The opinion of the court of appeals (App. D, *infa* 13a-21a) is not reported. Neither the entry of the court of common pleas (App. F., *infra* 24a-26a) nor the original entry of the Liquor Control Commission (App. G, *infra* 27a-29a) is reported.

JURISDICTION

This is an appeal from a final judgment entered pursuant to the decision of the Supreme Court of Ohio (App. A, *infra* 1a-9a) holding that Regulation 4301:1-1-44 of the Liquor Control Commission is valid. Appellant drew into question the validity of the regulation, insofar as it prohibits Appellant from advertising the retail price of its product outside the premises, as being repugnant to the Constitution of the United States. Judgment was entered February 24, 1982 by the Clerk of the Supreme Court of Ohio. The Supreme Court of Ohio held that the regulation is not repugnant to the constitution. A Notice of Appeal was filed with the clerk of that court on March 18, 1982 (App. H, *infra* 30a-31a). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (2).

CONSTITUTIONAL, STATUTORY PROVISIONS AND REGULATION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Twenty-First Amendment to the United States Constitution provides in pertinent part:

Section 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof is hereby prohibited.

Ohio Revised Code sections 4303.181 and 4303.182 provide in pertinent part:

4303.181 (A) Permit D-5a may be issued either to the owner or operator of a hotel or motel . . . only by the individual drink in glass and from the container, for consumption on the premises where sold, and to registered guests in their rooms . . .

4303.182 (A) Permit D-6 shall be issued to the holder of an A-1-A, A-2, C-2, D-2, D-3, D-4, D-5a, D-5b, or D-7 permit to allow sale under such permit between the hours of one p.m. and midnight on Sunday if such sale has been authorized under Section 4301.361 [4301.36.1] of the Revised Code and under the restrictions of such authorization. . . .

Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio (Ohio Adm. Code 4301:1-1-44) provides in pertinent part:

4301:1-1-44 Advertising

No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.

(A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.

(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on billboards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

Subsequent enactment of law by the 102nd Ohio General Assembly prohibits the advertising of the retail price of beer in any media. See Page 6, Section 4301.211 of the Revised Code of Ohio.

STATEMENT

This case involves the question of the constitutionality of subsections A and B of Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio. The regulation prohibits holders of C, D and G retail liquor permits[1] from including the price per bottle or drink or any reference to price advantage in advertising in any medium visible outside the premises.

The Appellant, Queensgate Investment Company (hereinafter "Queensgate"), operates the Holiday Inn in downtown Cincinnati, Ohio. It holds a D-5a-6 liquor permit for the entire motel premises, which includes a discotheque

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[1] The State of Ohio is a "monopoly state" with respect to the manufacture, importation and sale of beer and intoxicating liquor. Ohio Rev. Code Section 4301.10(A)(1). These products may not be manufactured, distributed, transported or sold without a permit from the department of liquor control. Ohio Rev. Code 4301.10(A)(2). The State is the sole vendor "of spiritous liquor (more than 21% alcohol) at retail and to holders of permits authorizing the sale of such liquor . . . ." Ohio Rev. Code Section 4301.10(A)(3). The State issues nine classes of permits to entities ranging from manufacturers to druggists to charitable groups. Ohio Rev. Code Sections 4303.02-4303.23.

known as "Lucy's In The Sky" on the top floor. The permit entitles it to sell, for consumption on its premises, "beer and any intoxicating liquor at retail, only by the individual drink in glass and from the container."[2]

This case arose in 1978, when Appellant was charged with three violations of Regulation 4301:1-1-44 for alleged advertisment of the retail price and a price advantage of an alcoholic beverage in a circular off the permit premises. The alleged violations were based on the August, 1978 edition of Lucy's monthly newsletter, "Skywriting," a copy of which had been provided to the Commission by an unknown source. "Skywriting" was regularly mailed to approximately 200 registered members of Lucy's club, and was available on the premises. The copy obtained by the Commission announced upcoming special events, including a "Coy Bacon Being Traded Party" where drinks would be sold from 7-11 p.m. on a particular evening for 79¢, and a "Drink Exchange," whereby a lunch receipt from the dining room would entitle the holder to receive one drink for 50¢ at Lucy's plus a card for another drink at 50¢ in the dining room.

After a hearing on November 29, 1978, the Commission found Queensgate guilty of all three violations of the regulation and issued an order suspending Queensgate's permit for seven days. (App. G, *infra* 27a-29a) Queensgate appealed on several questions of evidence, statutory construction, construction of the regulation and its enabling legislation, and constitutionality.[3] The court of

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[2] Ohio Rev. Code Sections 4301.181, 4303.182, *supra* p. 3.

[3] Unconstitutionality of an ordinance or regulation implemented by an administrative agency need not be argued before it, "for the issue of constitutionality can never be *administratively* determined." *Mobil*

common pleas reversed, placing of record an entry which stated that the Commission's order was not supported by reliable, probative and substantial evidence and was not in accordance with law. It did not specifically pass upon the assignments of error. (App. F, *infra* 24a-26a) The Commission appealed this ruling. The court of appeals reversed, holding, *inter alia,* that the regulation did not unreasonably restrain Queensgate's commercial speech.[4] Applying the test of *United States* v. *O'Brien,* 391 U.S. 367 (1968) (challenging the constitutionality of a federal law prohibiting the burning of draft cards as a restraint on "symbolic speech"), the court declared that the regulation is within the state's police powers, that it furthers a substantial governmental interest in discouraging the excessive consumption of alcoholic beverages, that it is unrelated to the suspension of free expression since it is directed towards the regulation of intoxicants rather than speech, and that the infringement is no greater than necessary to further that interest. (App. D, *infra* 13a).

Queensgate appealed to the Supreme Court of Ohio following the denial by the court of appeals of Queensgate's

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Oil Corp. v. *Rocky River,* 38 Ohio St. 2d 23, 26, 309 N.E.2d 900, 902 (1974) (emphasis in original).

Regulation 4301:1-1-44 was promulgated pursuant to Ohio Rev. Code Section 4301.01(E), which empowers the liquor control commission to adopt "uniform rules and regulations governing all advertising with reference to the sale of beer and intoxicating liquor throughout the state and advertising upon and in the premises licensed for the sale of beer and intoximating liquor."

[4] It appears that the commercial speech question was first raised in argument before the court of common pleas. The appellate court stated in its opinion: "The only remaining issue raised by appellee below, and here, is whether the regulation, as applied to appellee, violates the guarantee of free speech under the First and Fourteenth Amendments, by unreasonably infringing upon the permit holder's right to engage in protected speech." (App. D, *infra* 20a).

application for reconsideration on the commercial speech issue alone. The Supreme Court of Ohio affirmed, echoing the court of appeals' rationale, but applying *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980). The court ruled that while Queensgate's advertisement was clearly protected speech, it believed the ban of off-premises price advertising[8] to advance directly the governmental interest in minimizing the evils of alcoholic beverages and to be no more extensive than necessary to achieve that purpose. (App. A, *infra* 6a-8a.)

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[8] Subsection (A) of the regulation unambiguously forbids all advertising of price or price advantage either off the premises or in a manner visible from outside the premises. The language of subsection (B), however, would seem to suggest that a retail permittee such as Appellant may advertise the price of the "original container or packages."

The courts below rejected Appellant's argument that its conduct was within the permissive language of subsection (B) since it had merely stated the retail price of the beverage "by the individual drink in glass and from the container," which is the "container or package" in which it is authorized to sell. Ohio Rev. Code Section 4301.181(A), *supra* p. 3. The State has not disputed that the Commission interprets and applies the regulation as banning all off-premises advertising of the only unit by which permittees may sell for consumption on their premises. Further, the Commission views a statement of a price certain, such as Appellant made in "Skywriting," to be an illegal advertisement of price advantage even though there is no comparison to the permittee's regular price or to competitor's prices. Apparently, the Commission has its own standards of what it believes to be competitively advantageous.

See In the Matter of R M. J , 50 U.S.L.W. 4185, 4186 (No. 80-1431, January 25, 1982) (analysis of a rule based on the interpretation given to it by the enforcing entity where the language is unclear).

THE QUESTION IS SUBSTANTIAL

The Supreme Court of Ohio has declared constitutional a thirty-two year old regulation which forbids a duly licensed retail liquor permittee from publicly disseminating entirely truthful information about its lawful activity of selling alcoholic beverages, because of fears that the public will not use that information in their best self-interest. In so holding, the Ohio court has contravened a large body of law of this Court regarding the extent to which states may infringe upon the free exercise of commercial speech. The precise question of applying these precedents to advertising the retail price of alcoholic beverages has not been before this Court.[6]

This Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), established that there is no exception to the First Amendment for even purely commercial speech, where the idea communicated is simply "I will sell you the X [product or service] at the Y price." 425 U.S. at 358. Since *Virginia Pharmacy*, this Court has refused to let stand any restraint

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[6] Related questions have been and are before various courts. *See Oklahoma Telecasters Association* v. *Crisp*, No. 81-439-W (W.D. Okla. Dec. 18, 1981) *appeal docketed*, No. 82-1058 (10th Cir. January 18, 1982) (permanently enjoining the Oklahoma Alcoholic Beverage Control Board from enforcing against the plaintiff telecasters an article of the Oklahoma Constitution and a statute forbidding their solicitation or broadcast of advertisements for alcoholic beverages); *Opinion of the Justices to the Senate*, 366 N.E.2d 1220, 373 Mass. 888 (1977) (advisory opinion that proposed legislation to prohibit most advertising outside licensed premises presented substantial First Amendment problems); *Heir* v. *Degnan*, 411 A.2d 194, 202, 82 N.J. 109 (1980) (opining that a Division of Alcoholic Beverage Control regulation of price advertising by liquor retailers violated the First Amendment, except to the extent that it prohibited otherwise illegal price fixing between competitors).

on truthful advertising of lawful activity.[7] *In the Matter of R M. J*, 50 U.S.L.W. 4185, 4189-90 (No. 80-1431, January 25, 1982) (legal advertising); *Metromedia, Inc.* v. *City of San Diego*, — U.S. —, 69 L.Ed. 2d 800, 813 (1981) (off-site billboards); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557, 563-72 (1980) (promotional activities by electric utilities); *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission of New York*, 447 U.S. 530, 534-44 (1980) (bill inserts advocating nuclear power); *Society for the Welfare of Animals, Inc.* v. *Walrath*, 439 U.S. 810 (1979) (prices of veterinary services — vacated and remanded in light of *Bates* v. *State Bar of Arizona, infra*); *Bates* v. *Bar of Arizona*, 433 U.S. 350, 363-83 (1977) (prices of routine legal services); *Carey* v. *Population Services, Ltd.*, 431 U.S. 678, 700 (1977) (advertising and display of contraceptives); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977) (advertising of real estate); and *Beal* v. *Franklin*, 428 U.S. 901 (1976) (advertising of abortions — vacated and remanded in light of *Virginia Pharmacy, supra*).

Nor can it be maintained that there is any "alcoholic beverage" exception to rights otherwise protected by the Constitution. The Twenty-first Amendment is a partial exception to the operation of the Commerce Clause, which in no way abrogates the rights protected by the Bill of Rights and the Fourteenth Amendment. *California Liquor*

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[7] Commercial speech which is not entitled to protection includes that which is deceptive or misleading, *Friedman* v. *Rogers*, 440 U.S. 1, 12 (1979), and that which relates to unlawful activity, *cf. Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 50 U.S.L.W. 4267, 4269 (No. 80-1681, March 3, 1982). There is no dispute in this case that Queensgate is engaged in lawful activity and that the prices stated were entirely truthful.

Dealers Ass'n. v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 107-08 (1980); *Craig* v. *Boren*, 429 U.S. 190, 206-07 (1976); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971). The fact that a state has regulatory authority over a business entity does not justify a restriction on its speech.[8] *Consolidated Edison Co. of New York, Inc.* v. *Public Service Comm'n of New York*, 447 U.S. 530, 540 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 26 (1979); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 780 n. 16 (1978).

It is also clear that the off-premises price advertising ban is not merely a restriction of time, place or manner. In *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), the Court observed that such restrictions must be justified without reference to the content of the speech, must serve a significant governmental interest and must leave open alternative channels for communication of the information. *See also Metromedia, supra*, — U.S. at —, 69 L.Ed. 2d at 820 (prohibition of off-site billboard advertising addressed content and did not leave effective or affordable alternative channels of communication); *Linmark, supra*, 431 U.S. at 94 (prohibition of "for sale" and "sold" signs on real estate differentiated on the basis of content and did not leave other realistic avenues of communication).

The crux of this matter, then, is whether the State has a substantial interest to support the restriction on Queensgate's dissemination of truthful information about its lawful activity and, if so, whether the complete ban of off-

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[8] Indeed, each of the commercial speech cases has concerned a business subject to governmental supervision or control. See *Virginia Pharmacy, Bates* and *Walrath, supra* (pharmacists', lawyers' and veterinarians' price advertising); *Carey* and *Franklin, supra* (abortion and contraceptives); *Metromedia, supra* (zoning); *Central Hudson* and *Consolidated Edison, supra* (public utilities).

premises price advertising directly advances that interest and is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 564-66 (1980).

The governmental interest asserted in briefs by the Ohio Attorney General and accepted by the Ohio Supreme Court in its opinion below is "discouraging the excessive consumption of alcoholic beverages." 69 Ohio St. 2d 361, 366 (1982) (App. A, *infra* 8a). The existence and legitimacy of this interest was taken somewhat as a matter of faith by the Ohio courts, as no evidence concerning it was ever made a part of the record.[9] The substantiality of the asserted interest in promoting temperance by discouraging the dissemination of information about favorable prices is questionable in view of the fact that the State is the sole wholesale and retail vendor of alcoholic beverages in the original package, at prices substantially less per drink than are available from retail permittees such as Appellant. Advertisement of the prices offered by the State's own monopoly stores is permitted.[10] Moreover, the State eagerly collects permit fees, excise taxes and sales taxes from the permittees and from ultimate consumers.

Assuming, *arguendo*, the substantiality of the asserted interest, the nexus between the interest and the prohibition of

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[9] *See* p. 15 *infra*.

[10]

> Manufacturers and distributors of spiritous liquor are hereby permitted to advertise their products in Ohio, and such advertising may contain the statement that spirituous liquor may be purchased in original packages together with the state store prices thereof. Advertising shall not in any manner misrepresent the products advertised and shall be dignified in make-up and not offensive to the good taste of the public.

Ohio Adm. Code 4301:1-1-44(C).

price advertising is an apprehension that people will use the information in a manner which the State believes to be contrary to their own self-interest. The Ohio Supreme Court believed that the restriction is constitutional because its goal is the regulation of intoxicants rather than speech. 69 Ohio St. 2d at 366 (App. A *infra* 8a). Yet this rationale is directly contrary to the repeated, unequivocal declarations of this Court that a state may not use a restraint on the dissemination of truthful information about lawful activity to attempt to manipulate conduct in furtherance of a nonspeech-related goal. Of the argument that advertisement of prescription drug prices would lead to excessive consumption of drugs, the Court said in *Virginia Pharmacy, supra,* 425 U.S. at 769-70:

> [O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug information. . . .
>
> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. *Cf. Park-*

> *er* v. *Brown*, 317 U.S. 341, 87 L.Ed. 315, 63 S.Ct. 307 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

The Court has adhered to the *Virginia Pharmacy* rule. *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 96-7 (1977) (prohibition of on-site real estate signs not justified by the fear that they could cause racially motivated panic selling); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 375-76 (1977) (ban on lawyer advertising of prices for routine legal services not warranted by concern that it would stir up litigation); *Carey* v. *Population Services, Ltd.*, 431 U.S. 678, 701 (rejecting the restraint of public dissemination about contraceptives to discourage promiscuity). In *Central Hudson, supra*, 447 U.S. at 566 n. 9, the Court observed that such suppressions on commercial speech in the reputed interest of a nonspeech-related policy have been reviewed with "special care," with the result that it has not approved any ban on truthful, non-deceptive information about lawful activity:

> If the First Amendment means anything, it means that, absent clear and present danger, government has no power to restrict expression because of the effect its message is likely to have on the public.

Id. at 575 (Blackmun and Brennan, JJ., concurring).[11]

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[11] Justices Brennan and Blackmun rejected the "four-part test" enunciated by the majority as providing inadequate protection for "truthful, nonmisleading, noncoercive commercial speech." 447 U.S. at 573 (Blackmun and Brennan, JJ., concurring).

See also Metromedia, Inc. v. *City of San Diego,* — U.S. —, 69 L.Ed. 2d 800, 813 (1981).

This case fits precisely into the mold of these precedents: the State fears that if the public is aware of the prices offered by various competitors, they will patronize the advertiser and drink more than they would if kept in ignorance. The cases cited and discussed above prohibit states from attempting to manipulate conduct by preempting the speaker's right to advertise and the listener's right to receive information in order to make his own decisions.

Moreover, the regulation is based on the unsubstantiated assumption that advertising will cause excessive consumption. There is no showing the prohibited conduct, advertising the retail price of the drink, poses any more problems than conduct already permitted, selling alcoholic beverages, advertising price by the bottle, and offering discounts.[12] Increased consumption is not the inevitable result of price advertising.[13] Rather, the most likely result of advertising is that those persons chosing to drink will be more likely to patronize establishments which offer favorable prices. The only predictable effect of this regulation, as of those

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[12] The extent to which a permittee may discount the price of a drink is limited by another regulation, which prohibits the "giving away" of an alcoholic beverage. (Ohio Adm. Code 4301:1-1-46(E)).

[13] *See California Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 112 (1980) (resale price maintenance not shown to promote temperance); *Oklahoma Telecasters Ass'n.* v. *Crisp* (No. 81-439-W, December 18, 1981), *appeal docketed* (10th Cir. January 18, 1982) (no evidence that ban on alcoholic beverage advertising prevents alcohol abuse); *Opinion of the Justices to the Senate,* 366 N.E. 2d 1220, 1223-24 (1977) (casual prediction that a ban on off-premises advertising would deter over-consumption of alcohol thought contrary to the rationale in *Virginia Pharmacy* and *Carey* "that the First Amendment itself expresses a bias against keeping the public uninformed as part of an ostensible effort to better their condition.")

in *Virginia Pharmacy* and *Bates*, is to impair the ability of consumers to learn where their money can best be spent and to diminish the competition between retailers which would result from the free flow information. *See Virginia Pharmacy, supra*, 425 U.S. at 765; *Bates, supra*, 433 U.S. at 377. The irrationality of the alleged nexus is evident from the fact that persons must now patronize bars in order to determine the price of beverages, because the information is not available off the premises.

Furthermore, the State has offered no evidence to substantiate its belief that the prohibition of off-premises advertising directly discourages the excessive consumption of alcoholic beverages. This Court has refused to sustain restraints on commercial speech where the nexus between the asserted interest and the regulation was speculative. *See, e.g., In the Matter of R M. J* , 50 U.S.L.W. 4185, 4189 (No. 80-1431, January 25, 1982) (no record of how a limitation of the potential recipients for lawyer announcements advanced professional standards, or that an absolute prohibition was the only solution); *Metromedia, supra*, — U.S. —, 69 L.Ed. 2d at 828 (Blackmun and Brennan, JJ., concurring) (no evidence that off-site billboards actually impaired traffic); *Linmark, supra*, 431 U.S. at 95 (no showing that the prohibition of "for sale" and "sold" signs was needed to maintain an integrated community).

Finally, the State has failed to make any showing that the total ban of off-premises price advertising is not a more extensive restraint on free speech than is necessary to serve the alleged state interest. The State does not directly attack intoxication by prohibiting the offering of discount prices or by limiting the number of drinks which may be sold at a bargain price. It only prohibits off-

premises advertising of price, apparently reasoning that people will not go to permittees' places of business if they do not know the prices. The only sure result of the instant regulation is to restrict competition and withhold market information. The State has not even addressed its burden of showing that its interest cannot be adequately protected in some less constitutionally objectionable manner. *Central Hudson, supra* at 447 U.S. 570-71; *Linmark, supra,* 431 U.S. at 95-96.

Instead, the Supreme Court of Ohio offers this erroneous syllogism:

> The advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption. No less extensive a regulation would achieve the same purpose. Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive, e.g., increased prices, shorter hours, or reduced number of permits, would all place a greater burden on the permit holder.

69 Ohio St. 2d 361, 366-67, — N.E. 2d — (1982) (App. A, *infra* 8a). In so saying, the Ohio court ignores several crucial principles. First, as the alternatives it suggests for promoting temperance do not affect speech at all, they are *ipso facto* less extensive restraints on protected speech than is the ban of price advertising. Second, the court seems to forget that the State already prohibits the excessive consumption of alcohol directly through its criminal, liquor and traffic statutes.[14] Third, the court's

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[14] The Ohio statutes prohibit, *inter alia*, disorderly conduct in public while voluntarily intoxicated, conduct creating a risk to oneself or to another while intoxicated and operation of any vehicle under the in-

rationale completely ignores the direction of this Court that the best means to help people perceive their best interests is to open the channels of communication rather than to close them.

As this Court emphasized in the above-cited portions of *Virginia Pharmacy, Linmark, Bates, Carey* and *Central Hudson,* the constitutional method of dealing with the potential misuse of a product is not to suppress truthful information about its availability or cost, but rather to make more information available. If the State is truly concerned about the evils of alcoholic beverages, it is free to combat the problem directly by freely using the marketplace of ideas to educate the public on the hazards of alcohol abuse. It might require permittees to participate in this effort, or require warnings of health hazards such as those required of drug, tobacco and diet soft drink manufacturers.[15]

CONCLUSION

In sum, the Ohio court has sanctioned exactly what this Court has forbidden: the suppression of truthful information about lawful activity because of the recipients' feared use of the information. The Supreme Court of Ohio's validation of the regulation is clearly contrary to this Court's

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fluence of alcohol. Ohio Rev. Code Sections 2917.11(B), 4511.19. Further, a tavern keeper may not permit intoxication or drunkenness on the premises. Ohio Rev. Code Section 4399.16.

[15] Because of the existence of such untried alternatives, the district court in *Oklahoma Telecasters Ass'n* v. *Crisp,* No. 81-439-W (W.D. Okla. Dec. 18, 1981) *appeal docketed,* No. 82-1058 (10th Cir. Jan. 18, 1982), held that the state had failed to show that Oklahoma's constitutional and statutory prohibitions of alcoholic beverage advertising were the only solution for intemperance.

holdings that the interests of both the commercial speaker to advertise his product and of the consuming listener to receive information about the price of lawfully offered goods and services substantially outweigh the vague and paternalistic justifications for withholding public dissemination of such information. The advertising ban seeks to advance the asserted interest in temperance only by the indirect, unsubstantiated assumption that advertising would increase alcohol abuse. Furthermore, it is far more restrictive and less effective than other alternatives, many of which would involve no restraint on speech whatsoever.

Probable jurisdiction should be noted.[16]

Respectfully submitted,

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May 21, 1982.

[16] The Court may wish to consider summary reversal.

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APPENDIX A

OPINION OF THE SUPREME COURT OF OHIO

Queensgate Investment Co., d.b.a. Holiday Inn,
Appellant,

v.

Liquor Control Commission, State of Ohio,
Appellee.

[Cite as Queensgate Investment Co. v. Liquor Control Comm. (1982), 69 Ohio St. 2d 361.]

(No. 81-633—Decided February 24, 1982.)

APPEAL from the Court of Appeals for Hamilton County.

Queensgate Investment Co., appellant, owns and operates a high-rise motel in downtown Cincinnati, Ohio, and is holder of Liquor Permit D-5A-6, 7137983-0005. The permit covers the entire premises of the motel, including a discotheque located on the top floor called "Lucy's in the Sky."

Appellee wrote and published a monthly newsletter entitled "Skywriting." The August 1978 edition of the newsletter contained two items which advertised drinks at special prices. Specifically, one item referred to "LUCY'S PERPETUAL NOTION — The Drink Exchange." The promotion would permit a customer of the restaurant to obtain a drink in the discotheque "for only 50¢," and then upon returning to the restaurant the next day receive

the same price: "[s]avor lunch in the dining room daily and you're rewarded not only with fine food, but you can get two drinks a day for only $1.00, 'cause SOMEBODY UP THERE LIKES YOU!' " (*Sic.*) The other item advertised a "COY BACON BEING TRADED PARTY" at which drinks would be sold for 79 cents.

The newsletter had been published for approximately one year and was distributed on the permit premises and was also mailed to members of appellant's club. The mailings occurred on the second Friday of each month.

The Ohio Liquor Control Commission, appellee, alleged that appellant committed three violations of Ohio Adm. Code 4301:1-1-44[1]: that appellant "did advertise the retail price of alcholic (sic) beverage in a circular off of permit

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[1] Ohio Adm. Code 4301:1-1-44 provides, in pertinent part:

"4301:1-1-44 Advertising

"No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-1-03 and as hereinafter provided.

"(A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.

"(B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.

"Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on billboards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

"Subsequent enactment of law by the 102nd Ohio General Assembly prohibits the advertising of the retail price of beer in any media. See Page 6, Section 4301.211 of the Revised Code of Ohio."

premises," "did advertise a price advantage for alcoholic beverage in a circular off of permit premises," and "did advertise in a circular off of permit premises." All three violations were alleged to have occurred on August 14, 1978.

On November 29, 1978, a hearing was held before appellee. Appellee found appellant to be in violation of Ohio Adm. Code 4301:1-1-44 and, subsequently, imposed a seven-day suspension of appellant's liquor permit.

Appellant filed an appeal of the suspension order to the Court of Common Pleas of Hamilton County pursuant to R.C. 119.12, asserting that the order was not supported by reliable, probative, and substantial evidence, and was not in accordance with law. The Court of Common Pleas reversed and vacated appellee's order and entered judgment in favor of appellant. Upon appeal to the Court of Appeals, the trial court's judgment was reversed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Strauss, Troy & Ruehlmann Co., L.P.A., Mr. Samuel M. Allen and *Ms. M. Michele Fleming,* for appellant.

Mr. William J. Brown, attorney general, and *Mr. James M. Sterner,* for appellee.

Per Curiam.

I.

Initially, appellant challenges Ohio Adm. Code 4301:1-1-44 on three grounds: (1) that the regulation is invalid because no authority for it has been delegated to appellee by the General Assembly; (2) that the regulation is not uniform and its application by appellee is arbitrary, capricious and unreasonable; and (3) the appellee's order

was not supported by reliable, probative or substantial evidence.

Turning to appellant's first argument, we find that the challenged regulation does not exceed the grant of authority conferred upon appellee by the General Assembly. Authority for the regulation may be found in R. C. 4301.-03:

> "The liquor control commission may adopt * * * rules * * * necessary to carry out Chapters 4301 and 4303 of the Revised Code * * *. The rules of the liquor control commission may include the following:
>
> "* * *
>
> "(E) Uniform rules and regulations governing *all advertising* with reference to the sale of beer and intoxicating liquor throughout the state and *advertising* upon and in the premises licensed for the sale of beer or intoxicating liquor * * *." (Emphasis added.)

Appellee's regulation clearly is consistent with the specific statutory provision. The section states that regulations may govern all advertising of the sale of beer and intoxicating liquor by permit holders; the challenged regulation goes directly to the issue of this case: advertising.

Appellant relies upon *Burger Brewing Co.* v. *Thomas* (1975), 42 Ohio St. 2d 377, to support the argument that no authority has been delegated to appellee to promulgate Ohio Adm. Code 4301:1-1-44. *Burger* held that "it is evident that the General Assembly has not specifically expressed an intention that the commission have authority in the area of *pricing* in the liquor industry * * *." *Id.*, at page 383. (Emphasis added.) *Burger*, therefore, addressed the issue of regulation of price, not regulation of advertising, and, as such, is distinguishable from the case *sub judice*.

Moreover, although *Burger, supra,* did hold, at page 385, that the silence of the General Assembly "in a regulatory area of such substantial importance and impact [pricing] is persuasive to us that no devolution of such power was intended," there is no such silence here. In the matter of advertising, R. C. 4301.03 (E) was enacted which grants a devolution of their authority over "all advertising." Furthermore, R. C. 4301.211[2] specifically prohibits the advertising of the retail price of beer and malt beverages, which prohibition does not conflict with the general grant of authority of R. C. 4301.03 (E).[3]

Appellant's second contention is that the regulation is not uniform and is being applied unreasonably and capriciously. We disagree. The regulation is on its face clear and unambiguous, in that it prohibits permit holders from advertising price per bottle or drink. It does permit advertising of the retail price of the original container or package but prohibits any reference to price advantage. We fail to discern the confusion suggested by appellant between advertisement of price per drink and price of the original container or package.

---

[2] R.C. 4301.211 provides:

> "No holder of a permit issued by the department of liquor control shall advertise the retail price of beer and malt beverages in any newspaper, circular, radio broadcast, television telecast or by any other media of advertising off the premises of the permit holders."

[3] The specific prohibition on beer advertising does not imply a limitation of regulation of other advertising of other alcoholic beverages unless there is a conflict between the general and specific statutes. *Thomas* v. *Evans* (1905), 73 Ohio St. 140. We find no such conflict. R. C. 4301.211 prohibits a specific advertising of a specific beverage; R. C. 4301.03(E) still permits appellee to regulate other advertising of other alcoholic beverages not provided for in R. C. 4301.211.

Appellant's third contention is that appellee's order was not supported by reliable, credible evidence. Specifically, appellant argues that appellee produced no evidence that the August 1978, newsletter was ever mailed. At the hearing before appellee, the following colloquy took place between the manager of the permit premises and an assistant attorney general:

"Q. Now, in the August monthly newsletter of Skywriting, did you have any mailings?
"A. Yes, we did.
"Q. Were the mailings an exact copy of * * * [Exhibit C]?
"A. It was the same newsletter.
"* * *
"Q. Are they always mailed on the second Friday of the month?
"A. Yes, sir."

This admission by appellant's employee provides an evidentiary basis for appellee's order.

II.

Appellant also argues that Ohio Adm. Code 4301:1-1-44 is an unconstitutional restraint on the exercise of First Amendment rights. For the following reasons, we disagree, and hold Ohio Adm. Code 4301:1-1-44 does not violate the First Amendment to the United States Constitution.

Commercial speech receives some constitutional protection under the First Amendment to the United States Constitution. *Bigelow* v. *Virginia* (1975), 421 U.S. 809. Commercial speech is not wholly outside of the protection of the First Amendment, even though the advertiser's interest may be purely economic; the free flow of commercial information is indispensable for the well-informed allocation of economic resources. *Virginia State Board of Pharm-*

acy v. *Virginia Citizens Consumer Council* (1976), 425 U.S. 748. Nonetheless, a regulation of commercial speech may be upheld as not violative of the First Amendment if it complies with the four-part test articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York* (1980), 447 U.S. 557, at page 566:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Applying the first half of the *Central Hudson* test to the case *sub judice,* we find that the commercial speech involved concerns a lawful activity, the sale of alcoholic beverages by a permit holder. The advertisement contained in appellant's newsletter set forth a price per drink under certain conditions. It was not misleading to the consumer.

We also find that the asserted governmental interest is substantial. Since the adoption of the Twenty-first Amendment to the United States Constitution in 1933, the states have had the power to regulate "the transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors." Such regulation may be directed toward a minimization of the evils associated with alcoholic beverages. In *Ziffrin* v. *Reeves* (1939), 308 U.S. 132, at pages 138-139, the court held that the state's power to prohibit absolutely

includes the lesser power to permit manufacture, sale, transportation or possession, subject to prescribed conditions which are not unreasonable and which subserve the policy of confining the liquor traffic in order to minimize its evils. See also, *Solomon* v. *Liquor Control Comm.* (1965), 4 Ohio St. 2d 31. The governmental interest in discouraging the excessive consumption of alcoholic beverages falls within the ambit of interests described by *Ziffrin*.

Since the first two parts of the *Central Hudson* test have been answered positively, it is necessary to examine whether the regulation directly advances the governmental interest in minimizing the evils of alcoholic beverages by discouraging excessive alcoholic consumption. The regulation is directed toward regulation of the intoxicants themselves, rather than speech. This is unlike the case, *e.g.*, in *Virginia Pharmacy, supra,* where the speech was the actual focus of the regulation, since the aim of the restriction was the prevention of competition in pharmaceutical sales, not the discouragement of pharmaceutical purchases.

Finally, we come to the inquiry whether the regulation is more extensive than is necessary to serve the enunciated governmental interest. We hold that it is not. The advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; an advertising prohibition aids the interest in preventing that consumption. No less extensive a regulation would achieve the same purpose. Rather, in order to serve the same governmental interest, virtually any other regulation would be more extensive: *e.g.*, increased prices, shorter hours, or reduced number of permits, would all place a greater burden on the permit holder.

For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Celebrezze, C.J., W. Brown, Sweeney, Locher and Krupansky, JJ., concur.

Holmes, J., concurs in the judgment.

C. Brown, J., dissents.

APPENDIX B

ORDER OF THE SUPREME COURT OF OHIO

THE SUPREME COURT OF THE STATE OF OHIO
1982 TERM
To wit: February 24, 1982

No. 81-633

THE STATE OF OHIO,)
)
City of Columbus)

Queensgate Investment Co., d.b.a. Holiday Inn,

Appellant,

vs.

Liquor Control Commission, State of Ohio,

Appellee.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON County for entry.

[CERTIFICATION OMITTED]

APPENDIX C

JOURNAL ENTRY OF THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO OVERRULING APPLICATION FOR RECONSIDERATION

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-790901

QUEENSGATE INVESTMENT CO.,
d.b.a. HOLIDAY INN,
Appellant-Appellee,

vs.

LIQUOR CONTROL COMMISSION,
STATE OF OHIO,
Appellee-Appellant.

ENTRY OVERRULING APPLICATION FOR RECONSIDERATION

(Filed March 24, 1981)

This cause came on to be considered upon the application of the appellee for reconsideration of this Court's Decision and judgment entered herein on February 25, 1981, and

The Court being fully advised in the premises finds that said application is not well taken and that the same ought to be and hereby is overruled.

APPENDIX D

OPINION OF THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-790901

QUEENSGATE INVESTMENT COMPANY,
d.b.a HOLIDAY INN,
Appellant-Appellee,

vs.

LIQUOR CONTROL COMMISSION,
Appellee-Appellant.

DECISION
(Filed February 25, 1981)

Mr. Samuel M. Allen, 1800 First National Bank Building, Cincinnati, Ohio 45202, for Appellant-Appellee,

Messrs. William J. Brown and James M. Sterner, 2323 West Fifth Avenue, Columbus, Ohio 43204, for Appellee-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County,

Ohio, the transcript of the proceedings and the briefs of counsel, oral arguments having been waived.

Now, therefore, the assignment of error having been fully considered is accordingly passed upon in conformity with App. R. 12 (A) as follows:

The appellant, the Liquor Control Commission of the State of Ohio (Commission), appeals from the judgment of the Court of Common Pleas reversing a finding of the Commission that the appellee, a permit holder, was guilty of three violations of state regulations and the consequent imposition of a seven-day suspension. Appellee owns and operates a high-rise motel in downtown Cincinnati, and the liquor permit covers the entire premises, including the restaurant, lobby, hallways, rooms, and the discotheque on the top floor called "Lucy's in the Sky." The facts surrounding the incident for which the permit holder's license was suspended are not in dispute. Thus, at the hearing before the Commission, evidence was adduced to the effect that an investigator of the Commission visited the appellee's premises during regular business hours to inquire into the circumstances of a monthly newsletter entitled "Skywriting," written and published by the permit holder. A particular edition of this newsletter, for the month of August, 1978, was the subject of the instant investigation, since it contained several items which advertised drinks at special prices.[1] In a discussion with the

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[1] One item referred to "Lucy's Perpetual Notion — The Drink Exchange," which advertised a promotion by the permit holder which would permit a customer of the restaurant to obtain a drink in the discotheque "for only 50¢," and then upon returning to the restaurant the next day receive the same price. The item closed: "Savor lunch in the dining room daily and you're rewarded, not only with fine food, but you can get two drinks a day for only $1.00, 'cause SOMEBODY UP THERE LIKES YOU!"

The second item advertised a "COY BACON BEING TRADED

manager of the premises, the investigator learned that copies of this particular edition of the newsletter, as well as similar editions during the previous twelve months or so, were mailed off the premises to select customers of the discotheque. While it was admitted that the particular issue had not yet been mailed, the manager informed the investigator that the newsletter was generally distributed throughout the hotel rooms, lobby and restaurant on the 1st of each month and mailed to members of the club on the second Friday of each month. Based upon this information, the Commission issued a notice to the appellee to appear before the Commission for the purposes of defending against alleged violations of the state liquor regulations, which prohibit advertising in a circular off the premises retail prices and price advantages.

At the hearing before the Commission, the manager of the permit premises and the Assistant Attorney General engaged in the following colloquy on the subject of the distribution of the monthly newsletter:

> Q. Mr. Ruby, how long have you been publishing this newsletter, Skywriting?
>
> A. Approximately a year.
>
> Q. During that entire year, is the only method of distribution of Lucy's monthly newsletter, *i.e.*, Skywriting, at the discotheque at the permit premises and on the first floor?
>
> A. No, sir.
>
> Q. What is their other method of distribution?
>
> A. They have also been mailed to members of the club that belong to Lucy's.
>
> • • •

PARTY," a promotion in celebration of a local professional athlete, at which drinks would be sold for 79¢, his old jersey number. (T.d. 3, Exh. C).

Q. Now, in the August monthly newsletter of Skywriting, did you have any mailings?
A. Yes, we did.
Q. Were the mailings an exact copy of [Exhibit C]?
A. It was the same newsletter.

• • •

Q. Are they always mailed on the second Friday of the month?
A. Yes, sir.

Based upon this testimony and the physical evidence introduced at the hearing, the Commission found the permit holder to be in violation of its regulations and, subsequently, imposed a seven-day suspension. Appellees then filed an appeal from this suspension order to the Court of Common Pleas under R.C. 119.12, asserting that the order was not supported by reliable, probative and substantial evidence and was otherwise not in accordance with law. Following the submission of memoranda and oral argument from both sides, the court, acting as an appellate tribunal for these purposes, reversed the finding of the Commission and vacated the suspension order. It is from this judgment that the appellant raises this appeal, assigning as error the single contention that the court erred in reversing the Commission's finding and suspension order.

The threshold issue in this appeal is whether the Commission has the right to appeal the judgment of the lower court. Under R.C. 119.12, appeals from administrative decisions rendered by the Courts of Common Pleas are limited to questions of law relating to the constitutionality, construction, or interpretation of statutes or rules and regulations of the agency. Only when an appeal has been perfected on these grounds may this Court then review and determine the correctness of the lower court's judgment that the Commission's order is not supported by any re-

liable, probative and substantial evidence in the record. *Katz* v. *Department of Liquor Control* (1959), 166 Ohio St. 299, 141 N.E.2d 294. Thus, where the Court of Common Pleas concludes that the Commission did not have before it sufficient evidence of a permit holder's infraction and accordingly reverses an order of that agency, the Commission is precluded from raising solely the question of fact on appeal to this Court. *Katz, supra; Mentor Marinas, Inc.* v. *Board of Liquor Control* (10th Dist. 1964), 1 Ohio App. 2d 219, 204 N.E.2d 404.

However, where the judgment entry of the Court of Common Pleas is ambiguous, such as here where the court simply stated that ". . . the order of the Commission finding Appellant in violation of the aforesaid regulation and imposing a suspension on the appellant's liquor permit is not supported by reliable, probative and substantial evidence and is not in accordance with law" (T.d. 7), it becomes necessary for this Court, in the interests of justice, to examine the entire journal entry and proceedings below to ascertain upon which ground the judgment was founded. *A. B. Jac., Inc.* v. *Liquor Control Commission* (1972), 29 Ohio St. 2d 139, 280 N.E.2d 371. For example, in *Rrawu* v. *Liquor Control Commission* (1978), 46 Ohio St. 436, 349 N.E.2d 304, the court was presented with a fact situation markedly similar to the instant appeal in that the judgment entry of the Court of Common Pleas contained nothing to indicate that its reversal of the Commission's order was based upon a question of law. Nevertheless, a review of the entire record before the lower court made it apparent that since the conduct alleged to have violated the regulation had been stipulated, the court's finding necessarily had to involve its interpretation and application of the relevant regulation — a question of law. *Id.* at 441, 349 N.E.2d at 308. See, also *In re Mitchell* (1979), 60

Ohio St. 2d 85, 397 N.E.2d 764; *A. B. Jac., supra.* Thus, having perfected an appeal on a question of law, the Commission could then present and argue the issue of whether there was sufficient evidence to support its factual determination.

Applying these guidelines to the instant case, we find that while the court's judgment entry does not indicate that its reversal was predicated upon a question of law, the record of the proceedings below is replete with issues and arguments concerning the constitutionality, construction and interpretation of the relevant enabling legislation of the Commission and the particular regulation adopted pursuant thereto. The permit holder not only argued that there was a failure of proof before the Commission, but further asserted that the Commission had failed to adequately define the terms "advertising" and "price advantage," that this prohibitive regulation was not "uniform" and therefore contrary to R.C. 4301.03 (E), and that the offending newsletter did not fall within the types of advertising prohibited by the regulation. (T.d. 5.) Consequently, the Commission defended on each ground. (T.d. 6.) The court also had before it the transcript of the hearing before the Commission wherein the manager of the permit premises admitted engaging in the conduct which the Commission held to be violative of the regulations – an admission which for our purposes must be held to be the functional equivalent of the stipulation found in *Rrawu, supra,* and *A. B. Jac., supra.* Having undisputed facts before it the remaining issues before the court could only have been questions of law dealing with the constitutionality, construction and interpretation of the regulation. Thus, we conclude that the Commission's appeal from the judgment of the Court of Common Pleas, despite the perfunctory nature of the entry, presents a ques-

tion of law for our review and determination. Moreover, once having perfected an appeal on this basis, this Court has jurisdiction to review the ancillary claim of the Commission that its determination and order of suspension was, in fact, supported by sufficient probative evidence. Appellee's contention that the Commission has failed to raise an appealable issue is, therefore, without merit.

Having thus decided, we next direct our attention to the factual and legal issues surrounding the suspension order. The Commission contends, contrary to appellee's arguments below, that the regulations are constitutional, are not vague, arbitrary, capricious or otherwise unreasonable, that the appellee, by its own admission, engaged in conduct which falls squarely within the proscriptions of the regulations, and that the court therefore erred in vacating the Commission's order. For the reasons stated below, we agree with the Commission and accordingly sustain the instant assignment of error.

Regulation 4301:1-1-44 of the Liquor Control Commission provides, in pertinent part:

> As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.
>
> • • •
>
> Holders of Class C, D and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on billboards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

This regulation, on its face, is clear and unambiguous. It prohibits advertising either the price of drinks or price advantage off the premises, the latter concept of price advantage including both advantage compared with prices of competitors, and compared to its own normal prices. Thus, the language contained in the newsletter (see footnote 1) which was admittedly distributed off the premises, constituted violations of this regulation by advertising both price per drink and price advantages. We find no merit in appellee's contention that this regulation on its face, and as applied to its conduct, represents a capricious and arbitrary exercise of governmental authority. See *Ziffrin* v. *Reeves* (1939), 308 U.S. 132; *Solomon* v. *Liquor Control Commission* (1965), 4 Ohio St. 2d 31, 212 N.E.2d 595; *Board of Liquor Control* v. *Tsantles* (1952), 156 Ohio St. 512, 103 N.E.2d 749; *State ex rel. Zugraves* v. *O'Brien* (1935), 130 Ohio St. 23, 196 N.E.2d 664.

The only remaining issue raised by appellee below, and here, is whether the regulation, as applied to the appellee, violates the guarantee of free speech under the First and Fourteenth Amendments, by unreasonably infringing upon the permit holder's right to engage in protected speech. Appellee contends that purely commercial speech, as here, enjoys the protection of the First Amendment, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* (1976), 425 U.S. 748; *Linmark Assocs., Inc.* v. *Willingboro* (1977), 431 U.S. 85, and that governmental regulations which incidentally infringe upon this right are valid only if the state can demonstrate that its regulation bears a substantial relation to a legitimate governmental interest. While we agree with the appellee that this represents a correct statement of the relevant law, *Norton Advertising* v. *Arlington Heights*, C-790794 (1st Dist. Feb. 11, 1981), we are not persuaded that the subject regulations

represent unreasonable restraints on commercial speech. It is well-established that states are empowered to enact and enforce strict regulations concerning the manufacture, sale, transportation and disposition of alcoholic beverages which are reasonable and which serve the underlying policy of minimizing the substantive evils associated with alcoholic beverages. *E.g., Ziffrin, supra; Solomon, supra.* In reviewing the application of this regulation to the advertising of permit holder, we conclude that the regulation is within the constitutional police powers of the state, that it furthers a substantial governmental interest in discouraging the excessive consumption of alcoholic beverages which may reasonably be expected to flow from open advertising off the premises of drink prices and price advantages, that it is unrelated, proximately, to the suspension of free expression since it is directed toward the regulation of intoxicants and not speech, and that the infringement is no greater than necessary to the furtherance of that interest. *United States* v. *O'Brien* (1968), 391 U.S. 367. Appellee's contention that the instant regulation is violative of free speech is therefore without merit.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, reversed, and the matter is remanded to the Liquor Control Commission for the reinstatement of the order of suspension as originally ordered.

BLACK, P. J., PALMER and KLUSMEIER, J. J.

APPENDIX E

JOURNAL ENTRY OF THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C-790901

QUEENSGATE INVESTMENT COMPANY, d.b.a. HOLIDAY INN,

Appellant-Appellee,

vs.

LIQUOR CONTROL COMMISSION,

Appellee-Appellant.

JUDGMENT ENTRY

(Entered February 25, 1981)

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the

assignments of error are well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio be, and the same hereby is, reversed, and the matter is remanded to the Liquor Control Commission for the reinstatement of the order of suspension as originally ordered.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the Appellant-Appellee, by its counsel, excepts.

[illegible]

APPENDIX F

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

CASE No. A-7903598

QUEENSGATE INVESTMENT COMPANY d/b/a Holiday Inn,

Appellant,

vs.

LIQUOR CONTROL COMMISSION,

Appellee.

ENTRY REVERSING AND VACATING ORDER OF LIQUOR CONTROL COMMISSION

(Entered November 14, 1979)

This case came on to be heard by the Court on the 29th of October, 1979 pursuant to the appeal of Queensgate Investment Company, d/b/a Holiday Inn, from an order of the Liquor Control Commission finding the said Appellant in violation of Regulation 4301:1-1-44 of the Commission relative to advertising. The Court has examined the transcript of the proceeding before the Liquor Control Commission and the evidence adduced at said hearing and is fully advised in the premises. The Court finds that the

order of the Commission finding the Appellant in violation of the aforesaid regulation and imposing a suspension on the Appellant's liquor permit is not supported by reliable, probative and substantial evidence and is not in accordance with law.

It is therefore ORDERED that the order of the Liquor Control Commission, State of Ohio, dated April 17, 1979, finding the Appellant in violation of its regulation 4301:1-1-44 and the suspension set forth in said order be and the same hereby is reversed, vacated and ordered set aside and held for naught.

It is further ORDERED that upon this order becoming final and no appeal having been filed on behalf of the Liquor Control Commission, the prior order of this court staying the suspension as ordered by the Liquor Control Commission shall be vacated and held for naught.

All exceptions are preserved to the Appellee.

/s/ GUSWEILER, J.,
Judge
Court of Common Pleas
Hamilton County, Ohio

Have Seen:

/s/ JAMES M. STERNER
Assistant Attorney General
Liquor Section
Attorney for Appellee
2323 West Fifth Avenue
Columbus, Ohio 43204

STRAUSS, TROY & RUEHLMANN CO., L.P.A.

BY /s/ SAMUEL M. ALLEN
Attorneys for Appellant
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 621-2120

APPENDIX G

ORDER OF THE LIQUOR CONTROL COMMISSION

BEFORE THE LIQUOR CONTROL COMMISSION
STATE OF OHIO

Case No. 1886-78
Appearance Docket No. 4336

IN THE MATTER OF:

The Permit Holder listed on
attached Notice of Hearing

ORDER

1. This cause came on for hearing this 29th day of Nov., 1978, regarding the Permit Holder and the alleged violation (s) contained in the attached "NOTICE OF HEARING", which is a part of this order.

2. The Permit Holder entered his plea of ( ) ADMISSION (X) DENIAL as to violation (s) 1, 2, 3. The Commission dismisses violation (s) — on motion of the Attorney General.

3. The Commission finds the Permit Holder in violation as to the violation (s) 1, 2, 3; and/or not in violation as to the violation (s) —.

4. The Commission orders subject permit (s) suspended

for a period of 7 day (s), said suspension beginning at noon, May 2, 1979, and ending at noon, May 9, 1979.

LIQUOR CONTROL COMMISSION
– STATE OF OHIO
219 S. High Street,
Columbus, Ohio 43215

/s/ DAVID L. KESSLER
Chairman
/s/ FLOYD C. MOON
Vice Chairman
/s/ DON WOODLAND
Member

( ) Concurrent with Case No. (s) .... Docket No. ....
( ) Consecutive with Case No. (s) .... Docket No. ....
( ) Immediate Imposition
(X) Counsel /s/ SAMUEL ALLEN
Mailed: 4-17-79

Case No. 1886-78
Docket No. 4336
Mailing Date 11/9/78

TO:

QUEENSGATE INVESTMENT CO.
Permit Holder
dba Holiday Inn
800 W. Eighth Street
Cincinnati, Ohio 45203 – Hamilton County
D-5A,6 10/1/78 7137983-0005
Permit (s)

Set for November 29, 1978 (Cont'd fr. November 8)
9:00 A.M., EST.
Hearing Date and Time

You are hereby notified that a hearing will be held before the Liquor Control Commission of the State of Ohio, 219 South High Street, Columbus, Ohio, at the date and time stated above, to determine whether your permit (s) should be suspended or revoked for alleged violations of the provision (s) of the Revised Code of Ohio and/or the regulation (s) of the Liquor Control Commission, to-wit:

Violation #1 – On August 14, 1978, your agent and/or employee, JEFF B. RUBY did advertise the retail price of alcoholic beverage in a circular off of permit premises, in violation of 4301:1-1-44, a regulation of the Ohio Liquor Control Commission.

Violation #2 – On August 14, 1978, your agent and/or employee, JEFF B. RUBY did advertise a price advantage for alcoholic beverage in a circular off of permit premises – in violation of 4301:1-1-44, a regulation of the Ohio Liquor Control Commission.

Violation #3 – On August 14, 1978, your agent and/or employee, JEFF B. RUBY did advertise in a circular off of permit premises, in violation of 4301:1-1-44, a regulation of the Ohio Liquor Control Commission.

Sub: Inv. Gene Brill #30

You may be present at said time and place, with or without counsel, and at said hearing may present evidence and examine witnesses appearing for or against you.

APPENDIX H

NOTICE OF APPEAL

IN THE SUPREME COURT OF OHIO

Case No. 81-633

QUEENSGATE INVESTMENT CO.,
d.b.a. HOLIDAY INN,

Appellant,

vs.

LIQUOR CONTROL COMMISSION,
STATE OF OHIO,

Appellee.

NOTICE OF APPEAL

(Filed March 18, 1982)

Queensgate Investment Co., d.b.a. Holiday Inn hereby appeals the judgment of the Supreme Court of Ohio entered February 24, 1982 insofar as it upheld the validity of Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio, which was challenged by Appellant as being repugnant to the Constitution of the United

States. Appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. § 1257 (2).

Respectfully submitted,

/s/ SAMUEL M. ALLEN
Attorney for Appellant Queensgate Investment Co., d.b.a. Holiday Inn
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

OF COUNSEL:
Strauss, Troy & Ruehlmann Co., L.P.A.
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

[CERTIFICATE OF SERVICE OMITTED]

81-2174

Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. A-828

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA
HOLIDAY INN,

Petitioner

v.

LIQUOR CONTROL COMMISSION,
STATE OF OHIO,

Respondent

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Counsel of Record
Assistant Attorney General

JAMES M. STERNER
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
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(614) 466-3232

Attorneys for Appellees

QUESTION PRESENTED

Regulation 4301:1-1-44 of the Ohio Liquor Control Commission which regulates advertising of alcoholic beverages is a legitimate exercise of the state police power to protect the public health, safety, and welfare of the citizens of the State of Ohio.

STATUTE INVOLVED

This appeal raises the question of the validity of Regulation 4301:1-1-44 of the Liquor Control Commission, State of Ohio, which is adequately set forth in the Appellant's Jurisdictional Statement.

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CASE NO. A–826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

QUEENSGATE INVESTMENT COMPANY DBA HOLIDAY INN,

Petitioner

v.

LIQUOR CONTROL COMMISSION, STATE OF OHIO,

Respondent

ON APPEAL FROM
THE SUPREME COURT OF OHIO

MOTION TO DISMISS

The Appelle moves the Court to dismiss the appeal herein on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of the Supreme Court of Ohio which held Regulation 4301-1-1-44 of the Liquor Control Commission not to be an unconstitutional restraint on the exercise of First Amendment rights.

This case involves a violation of 4301-1-1-44, a regulation of the Ohio Liquor Control Commission. Specifically, this case relates to the improper advertising of alcoholic beverages by an agency and/or employee of the permit holder.

On November 29, 1978, pursuant to assignment and notice thereof, this matter was called for hearing before the Liquor Commission.

At the hearing before the Commission, Investigator Gene Brill of the Ohio Department of Liquor Control testified concerning the improper advertising contained in a newsletter mailed out by an employee of the permit holder, Jeff Ruby. This newsletter was written and published by the permit holder under the name of "Skywriting". The newsletter was offered into evidence. The newsletter contained two items which referred to the price of drinks to be served on the premises. One item was about a Coy Bacon being traded to be held on September 10th wherein drinks were seventy-nine cents ($.79) from 7:00 P.M. to 11:00 P.M. The other article was in reference to a perpetual drink motion wherein a customer would receive a receipt entitling him to a fifty cent ($.50) drink good during the lunch hour by buying a cocktail during 5:00 P.M. to 7:00 P.M.

Further testimony by Investigator Brill and Jeff Ruby, the employee in charge of the newsletter clearly proved that this newsletter was mailed to persons outside the permit premises.

On April 17, 1979, the Liquor Control Commission issued an order under Case No. 1886-78, wherein they found that these violations did occur and were supported by the evidence. On the basis of the evidence presented, the Commission ordered the permit suspended for a period of seven (7) days. On April 20, 1979, the permit holder filed a Notice of Appeal from this Order to the Court of Common Pleas of Hamilton County. That Court found that the Commission's Order was unsupported by reliable, probative and substantial evidence, and not in accordance with law, and reversed the decision of the Commission.

On December 11, 1979 an appeal was filed on behalf of the Liquor Control Commission to the First District Court of Appeals found that the Commission's Order was supported by reliable, probative and substantial evidence and was in accordance with law, and reversed the decision of the Hamilton County Common Pleas Court. The First District Court of Appeals also ruled that the regulation in question was not an arbitrary or capricious exercise of governmental authority; nor was this regulation a restraint on the exercise of First Amendment rights.

The Appellant then filed an appeal to the Supreme Court of Ohio where jurisdiction was granted. However, as stated earlier the Supreme Court of Ohio ruled that Regulation 4301:1-1-44 of the Ohio Liquor Control Commission was proper in advancing the substantial governmental interest of minimizing the evils of alcoholic beverages. The Supreme Court of Ohio used the test set forth in the matter of **Central Hudson Gas & Electric Company v. Public Service Commission of New York**, 447 U.S. 557 (1980).

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT ALREADY DECIDED BY THIS COURT.

It is a well settled principal that there are many evils inherent in the liquor industry. These "evils" have been readily apparent and are not merely an esoteric term, as emphasized by the United States Supreme Court in **Ziffrin v. Reeves**, 308 U.S. 132 (1939), at page 138:

> "The State's power to prohibit absolutely includes the lesser power to permit manufacture, sale, transportation of possession, subject to prescribed conditions which are

> not unreasonable and which subserve the policy of confining the liquor traffic in order to minimize its evils. . ."
> (Emphasis added)

The Court was even more emphatic on this point in the case of **Crowley** *v.* **Christensen,** 137 U.S. 86 (1890). At page 91, the Court states:

> "Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, . . . Their sales in that form may be absolutely prohibited. It is a question of public expediency and morality, and not of federal law. The public power of the State is fully competent to regulate the business — *to mitigate its evils* or suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of a state or of a citizen of the United States. As it is business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. *The manner and extent of regulation rest in the discretion of the governing authority."*
> (Emphasis added)

Similarly, the Court held in **Walding, Kinnan and Marvin Company v. Department of Liquor Control,** 305 U.S. 560 (1938), that engaging in the alcoholic traffic is not an inherent right protected by either the Federal of State Constitution.

The Appellant contends, that despite all of the aforementioned principles, that purely commercial speech, as here, enjoys the protection of the First Amendment. The majority of the cases cited by the Appellant in this area such as **Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.**, 425 U.S. 748, (1976) don't have anything at all to do with the regulation of alcoholic beverages. The major test in most of the cases cited by the Appellant is that the government regulation is valid only if the state can demonstrate that the regulation bears a substantial relation to a legitimate governmental interest.

As previously stated it is well established that the states are able to enact and enforce strict regulations concerning the manufacture, sale, transportation and dispositiion of alcoholic beverages which are reasonable and which serve the underlying policy of minimizing the substantive evils associated with alcoholic beverages. **Ziffrin v. Reeves**, 308 U.S. 132, (1939).

The main purpose of Regulation 4301:1-1-44 is to prevent advertising campaigns wherein low prices and discounts are offered in newspapers, billboards, hanbills, etc., which results in the encouragement of excessive consumption of alcoholic beverages. Additionally, competition between permit holders would be such that only the large corporate permit holder with unlimited advertising funds would be able to stay in business. Obviously, he could afford the short term losses by practically giving away his liquor pursuant to a mass advertising campaign. The young, impressionable teenager would be bombarded by advertisements throughout newspapers, handbills, billboards, radios, televisions, etc., and liquor would be shown in the same light as bubble gum, soft drinks, etc. Similarly, bars would seek to project the same "fun atmosphere," through advertisement, as that of a zoo or an amusement park. Such result was contemplated by the Commission when they enacted Regulation 44. The Twenty First Amendment of the Constitution specifically allows the individual States to

control the alcoholic traffic within their boundaries. Pursuant to such authority, the Liquor Commission, when enacting Regulation 4301:1-1-44, felt that it would be in the interests of protecting the public decency, sobriety, and good order to proscribe the manner of advertising alcoholic beverages in the State of Ohio.

Regulation 4301:1-1-44 is within the constitutional police power of the State, and it also furthers a substantial governmental interest by helping to discourage the excessive consumption of alcoholic beverages. It would not require much imagination to picture the problems of price wars at bars which would be triggered by the removal of Regulation 4301:1-1-44 which would in turn lead to excessive consumption and be harmful to the health, welfare, and safety of this State. This regulation is aimed at controlling the excessive consumption of alcoholic beverages which is a substantial governmental interest. As the Court stated in (1972) **California v. LaRue**, 409 U.S. 109, (1972) at page 114, ". . .The braod sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals. . ."

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves this Court to dismiss this appeal.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Counsel of Record
Assistant Attorney General

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30 East Broad Street, 17th Floor
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(614) 466-3232

Attorneys for Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion to Dismiss was sent by regular U.S. mail to Mr. Samuel M. Allen, 2100 Central Trust Center, 201 East Fifth Street, Cincinnati, Ohio 45202 on this _____ day of August, 1982.

THOMAS V. MARTIN
Assistant Attorney General